88-1346

Supreme Court, U.S.
FILED
FEB 11 1989
JOSEPH SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO.

ALBERT MORELLA AND LESTER ANTHONY
PETITIONERS

VERSUS

COOPER/T. SMITH, INC. AND THE GENERAL TRUCK DRIVERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS LOCAL NO. 270, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INDEPENDENT
RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOEL P. LOEFFELHOLZ
2-3-4 LOYOLA, SUITE 900
NEW ORLEANS, LA 70112
PHONE: (504) 524-9687
ATTORNEY FOR PETITIONERS

QUESTIONS PRESENTED FOR REVIEW

1.

Petitioners herein, union members, brought an action in the U. S. District Court for the Eastern District of Louisiana under Section 301 of the Labor-Management Relations Act (29 USCA § 185), hereinafater § 301, against their employer alone for breach of the collective bargaining agreement and, by amended complaint, further amplified the original complaint as against their employer alleging its (employer) and their Union's subversion of the grievance process that petitioners went through prior to filing suit. The amended complaint then went on, in a totally separate count, to name the Union as a co-defendant.

Prior to the amended complaint the employer filed a Motion for Summary Judgment. After the Amended Complaint, both the employer and the Union filed a Joint

Motion to Dismiss on the grounds that petitioners were compelled by law to name and sue both the employer and Union together in the original complaint within six months of the completion of the grievance process and that since petitioners had originally named and sued only the employer within the six months (the amended complaint being filed eight months after the completion of the grievance process) they were time barred from even asserting the Union's breach of its duty of fair representation as part of their proof in the original action against the employer alone and the entire case should be dismissed.

The District Court granted the motion to dismiss and, in a two sentence per curiam citing its opinion in Holmes vs. Greyhound Lines, Inc., 757 F.2d 1563 (5th Cir. 1985), the Fifth Circuit Court of Appeals affirmed the lower court and the case was dismissed.

Was this error? Must an aggrieved employee sue both his employer and union in a § 301 action?

2.

Is the effect of and the result reached by the Fifth Circuit in Holmes based on faulty grounds and in conflict with applicable decisions of this Court, other Circuit Courts of Appeal and earlier and later decisions of the Fifth Circuit itself?

3.

The amended complaint contained allegations that the Employer and Union both independently and in concert with each other subverted the grievance process. The employer in its motion to dismiss argued that the petitioners had to sue both the employer and union together and could not sue one without the other under §301 and that since only the employer was named in the original complaint the amendments could not relate back under FRCP 15 even as to the employer

who was originally and timely sued. The District Court agreed, granted the motion to dismiss and the Fifth Circuit affirmed.

Was this error? Why shouldn't the allegations of the amended complaint relate back pursuant to FRCP 15 as to the originally named defendant?

4.

In a § 301 action must an aggrieved employee prove that his union failed in its duty to fairly represent him in the grievance process inorder to prevail or rather is the standard that all he need show is that the grievance process was in some manner subverted to his detriment by either his union or his employer or both?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	2
TABLE OF CONTENTS	6
TABLE OF AUTHORITIES	7
OPINIONS BELOW	8
STATEMENT AS TO JURISDICTION	9
STATUTE INVOLVED	10
STATEMENT OF THE CASE	10
ARGUMENT	21
CONCLUSION	38
CERTIFICATE	41

APPENDIX:

A.	29 USCA § 185	A-1
B.	Opinion of the District Court	B-1
C.	Judgment of the District Court	C-1
D.	Holmes v. Greyhound Lines, Inc.	D-1
E.	Per Curiam of the Fifth Circuit (Politz, Garwood and Smith, Circuit Judges)	E-1
F.	Denial of Suggestion for Rehearing En Banc, treated as Petition for Panel Rehearing (Garwood, Circuit Judge)	F-1

TABLE OF AUTHORITIES

	PAGE
Cases:	
Bowen v. U. S. Postal Service 459 U.S. 212, 103 S.Ct. 588 (1983)	21
Clayton v. International Union, etc. 451 U.S. 679, 101 S.Ct. 2088 (1981)	21
Conley vs. Gibson 355 U.S. 41 (1957)	35
Daigle v. Gulf States Utilities, et al 794 F.2d 974 (5th Cir. 1986)	24
Del Costello v. Teamsters 462 U.S. 151, 103 S.Ct. 2281 (1983)	21
Foman vs. Davis 371 U.S. 178 (1962)	35
Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 96 S.Ct. 1048 (1976)	21
Holmes v. Greyhound Lines, Inc. 757 F.2d 1563 (5th Cir. 1985)	9
Schiavone vs. Fortune 477 U.S. , 106 S.Ct. 2379 (1986)	35
Smith v. Kerrville Bus Co. 748 F.2d 1049 (5th Cir. 1984)	24
UPS v. Mitchell 451 U.S. 56, 101 S.Ct. 1559 (1981)	21
Vaca v. Sipes 386 U.S. 171, 87 S.Ct. 903 (1967)	21
Other Authorities:	
28 U.S.C.A. § 1254(1)	10
29 U.S.C.A. 1985 (Appendix A)	10

OPINIONS BELOW

In an opinion dated November 19, 1987 (Appendix B) and by judgment dated November 20, 1987 (Appendix C) the U. S. District Court for the Eastern District of Louisiana, Veronica D. Wicker, Judge, dismissed petitioner's suit against their former employer for breach of the collective bargaining agreement by contracting out work in order to lay petitioners off.

The Court recognized that the action against the employer was timely filed but pointed out that since petitioners did not name the Union as a defendant and make allegations of union misconduct within six months of the arbitration award it was the Court's opinion that any attempt to amend the complaint making allegations of union misconduct was time barred <u>even as to the original defendant</u> (employer) who <u>was</u> timely sued and could not relate back under FRCP 15(c).

The effect of this judgment makes it mandatory that an aggrieved employee must name and sue both his employer and union together within six months of an adverse arbitration award or he loses the right to bring a § 301 action altogether if he chooses to sue only the employer or union within the time frame.

The Fifth Circuit Court of Appeals, in an unpublished Per Curiam dated October 19, 1988 (Appendix E), affirmed the District Court citing Holmes v. Greyhound Lines, Inc., supra as authority.

STATEMENT AS TO JURISDICTION

Petitioners seek review of the Fifth Circuit's Per Curiam dated October 19, 1988 and its denial of the Suggestion for Rehearing En Banc dated November 17, 1988 (Appendix F) which of necessity also requires review of Holmes v. Greyhound Lines, Inc.,

supra. and the District Court's opinion hereinbelow dated November 19, 1987.

This Court has jurisdiction to review the above matters by writ of certiorari pursuant to 28 U.S.C.A. § 1254(1).

STATUTE INVOLVED

29 U.S.C.A. 1985 (Appendix A)

STATEMENT OF THE CASE

In March, 1969 and April, 1978, petitioners Lester Anthony and Albert Morella, respectively, went to work as employees of Cooper/T. Smith. Both Mr. Anthony and Mr. Morella were, and are, members of Local No. 270 of the Teamsters Union.

Mr. Anthony was employed as a truck driver. The company maintained a complete mechanic and tire repair shop at its central yard in order to maintain its trucks. Mr.

Anthony was, and is, qualified to do tire repair work as well as drive the trucks.

Mr. Morella was employed in the rope room at the company's central yard as a "rigger". His duties required the use of his trained skill in splicing and rigging rope and wire rope for the various slings used on the company's equipment and cranes for the loading and unloading of cargo from ships. The company maintained a fully supplied, equipped and staffed rope room for the purpose of fabricating the necessary slings from scratch out of different types of rope and wire rope.

While employed at Cooper/T. Smith petitioners were represented by the Union and covered by the Collective Bargaining Agreement (hereafter referred to as the "Contract") between the company and Union.

That Contract provides in Article 27 thereof:

ARTICLE XXVII - SUBCONTRACTING

> The Company agrees that it will not subcontract out any work normally performed by employees represented by the Teamsters Local No. 270 for the purpose of laying off any regular full time employee, where the necessary equipment to perform said work is available when needed and skills of present employees can be utilized when needed.

The company began subcontracting out the rope rigging work normally performed by Mr. Morella and laid him off on March 9, 1984.

He then filed grievances under the contract and on May 24, 1984 a joint Union/Company Grievance Committee held in favor of Mr. Morella and against the company finding that the company did subcontract work out for the purpose of laying him off and ordered that he be reinstated with all back pay and benefits.

Thereafter, the company once again began subcontracting out work normally performed by Mr. Morella and on August 2, 1985 he was laid off once again. Several other employees of the company, including Mr. Anthony, were also laid off at the same time.

After this lay off, petitioners and the others filed grievances under the Contract again alleging that the company subcontracted their work out for the purpose of laying them off.

The business agent of the Union, who had represented the Union and Mr. Morella during his March - May, 1984 grievance, represented petitioners and the others in their grievances arising out of this August 2, 1985 lay off.

The Union required, insisted and demanded that the company produce its business records for inspection. The company

produced its records which showed conclusively that it was subcontracting out work normally performed by petitioners and the others. On October 8, 1985 a Joint Union/Company Grievance Committee held in favor of Mr. Morella, Mr. Anthony and the others finding, once again, that the company was in violation of Article 27 of the Contract by subcontracting out work normally performed by petitioners and the others for the purpose of laying them off and ordered that they be reinstated with no loss of benefits and all back pay.

Despite repeated demands the company refused to honor the Committee's decision and on December 4, 1988 the Union sued the company to enforce the decision.

After the case was set for trial the Union and company entered into a settlement agreement on June 5, 1986 providing that petitioners and the others

would be reinstated as of June 4, 1986 with back pay and no loss of benefits and reserving unto them the right to bring further grievances should they be laid off again in violation of Article 27 of the Contract.

On June 10, 1986, six days after being reinstated and given what purportedly was their back pay, Mr. Morella and Mr. Anthony were again laid off allegedly for lack of work.

During the six days they were back at work it was obvious that the company was still subcontracting out work that they were capable of doing and normally performed.

Mr. Morella and Mr. Anthony once again filed grievances for their lay offs in violation of Article 27 of the Contract by the company.

Once again the Union received their grievances and assured them that they would be processed the same as the others.

As time went by it became apparent that the union was not going to require the company to produce its records as it had done in the previous grievances or contact the subcontractors or go to the locations of the cranes and equipment that contained the subcontracted out work.

Concerned about this obvious change in attitude Mr. Morella first asked and then pleaded with the Union to do these things before the Grievance Committee hearing. The Union refused and petitioners asked that they be allowed to have an attorney help with the case. This request was also denied by the Union.

Prior to the Grievance Committee hearing Mr. Morella and Mr. Anthony asked that an attorney of their choosing be allowed to sit in and observe the hearing without participating or even taking notes. This request was also denied by the Union and the company.

Prior to and at the hearing itself, November 12, 1986, the Union did not request of the company to produce its records and, not having spoken to or obtained records from the subcontractors or gone out to work sites to observe the subcontracted work, could offer no evidence in favor of Mr. Morella or Mr. Anthony.

At the hearing the company's own witness admitted that, as to tire repair work, it was still, even as of that date, being subcontracted out in spite of the fact that it was work customarily done by Mr. Anthony.

As the direct result of the company's actions and the Union's handling of their grievances in such a perfunctory manner by failing to prosecute them with the same zealousness that it had previously, the Grievance Committee was misled, misinformed and ultimately issued its November 14, 1986

decision adverse to petitioners based on the misleading, false, erroneous, unrefuted and unchallenged arguments of the company.

Subsequent to the Grievance Committee's ruling Mr. Morella and Mr. Anthony themselves came into possession of documentary proof positive of the company's subcontracting out of their work. However, because the grievance procedure was completed and could not be reactivated under the terms of the contract and the obvious disinterest and perfunctory handling of their grievances by the Union and the company, they brought suit for breach of the contract against the company on May 6, 1987 in the U. S. District Court for the Eastern District of Louisiana which has jurisdiction pursuant to 29 U.S.C.A. § 185(a).

The company filed a motion for summary judgment on June 15, 1987 claiming that without allegations of subversion of the

grievance process it was entitled to judgment.

On July 17, 1987 petitioners filed an amended complaint the first part of which further detailed their claim against the Company by alleging both its independent subversion and its joint subversion with their union of the grievance process they went through after losing their jobs and the Union's breach of its duty of fair representation.

The second part of the amended complaint added a second separate count to the original complaint by naming the Union as a party defendant and alleging its subversion of the grievance process both independently and in concert with their employer.

The Union answered and the company and Union filed a joint motion to dismiss alleging that the petitioners were required by the jurisprudence to sue both the

company **and** Union **together** in order to recover and that since the Union was added as a defendant more than six months after the grievance committee decision the entire case (not just the claim against the Union) was time barred even though the suit against the company was timely filed.

Despite this Court's, the Fifth Circuit's and other circuit's clear precedent to the contrary, and, additionally, this Court's rulings that FRCP 15 be interpreted liberally and that decisions on the merits are much favored over pleading games and manipulation of technicalities in which one misstep may be decisive, the District Court granted the motion to dismiss, dismissed the case and the Fifth Circuit, citing Holmes v. Greyhound Lines, Inc., supra, affirmed.

ARGUMENT

For the reasons cited and argued below it is respectfully submitted that the Fifth Circuit's per curiam affirmation of the District Court's opinion and judgment citing Holmes and the reasoning therein as its authority is in direct conflict with applicable decisions of this Court, other Federal Courts of Appeal and even decisions of the Fifth Circuit itself.

Since 1967 this Court has attempted to come to grips with these issues in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048 (1976), Clayton v. International Union, etc., 451 U.S. 679, 101 S.Ct. 2088 (1981), Bowen v. U. S. Postal Service, 459 U.S. 212, 103 S.Ct. 588 (1983), UPS v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559 (1981) and Del Costello v. Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983).

After first holding and explaining (pp. 909-913) that a Union has a statutory duty to fairly represent its member employees both in its collective bargaining efforts and in the enforcement of the resulting collective bargaining agreement and that the question of whether a Union has breached its duty of fair representation will, in many (not all) cases, be a critical issue in a suit such as the instant matter and that an employee can bring a § 301 action even if the collective bargaining agreement contains a finality provision (as here), this Court, in Vaca, supra, stated the issue thusly:

> ". . . The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures." 87 S.Ct. at p. 914.

The Court then held:

". . . To leave the employee remediless in such circumstances would in our opinion be a great injustice. We cannot believe that Congress in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." 87 S.Ct. at p. 914 (Emphasis added)

In Bowen, supra, this Court further explained its position and reasoning thusly:

". . . Of paramount importance is the right of the employee, who has been injured by both the employer's and the union's breach, to be made whole." 103 S.Ct. at p. 595. (Emphasis added)

Del Costello, supra, as specifically recognized and followed by the Fifth Circuit in Daigle v. Gulf States Utilities, et al, 794 F.2d 974 (5th Cir. 1986) at p. 977 thereof, put to rest once and for all the question of who an employee must sue and join as defendants in § 301 actions such as this by holding:

> **"The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both."** 103 S.Ct at p. 2291 (Emphasis added)

SEE ALSO: Smith v. Kerrville Bus Co., 748 F.2d 1049 (5th Cir. 1984) at page 1053: **"An employee may sue his employer, his union, or both . . ."** (Emphasis added)

The common threads of Vaca, Hines, Clayton, Bowen and Del Costello, as followed by the Fifth Circuit, are as follows:

1. The affected employee may bring a § 301 suit against either the Company or the Union or both and need not sue both either together or separately.

2. Of primary importance is to make the injured and aggrieved worker whole and not deny him access to the Court.

Following Vaca and Hines, as later reaffirmed by Clayton, Bowen, UPS and Del Costello, the Ninth Circit's position on this issue has been stated thusly:

> ". . . Neither an employer nor a union is an indispensable party in an action against the other by an employee-union member when the action against the employer is based on a violation of the terms of the collective bargaining agreement and the action

> against the union is based on the statutory duty of fair representation.
>
> * * *
>
> ". . . plaintiff's cause of action against his former employer was contractual. He alleged that the former discharged him in violation of the provisions of the collective bargaining agreement between the union and his employer which was in effect at the time of his discharge. In such a cause of action, the union is not an indispensable party . . ." Kaiser v. Local #83, 577 F.2d 642 (9th Cir. 1978)

Therefore, pursuant to the clearly established mandate of this Court in Vaca, Hines, Clayton, Bowen, UPS and Del Costello, as followed by the Fifth Circuit itself in Daigle and Smith vs. Kerville Bus as well as by the Ninth Circuit in Kaiser, an aggrieved employee may choose, under § 301, to sue only his employer for breach of contract and, while not a defendant in the suit, the Union's breach of its duty of fair representation must be shown only as an

element of proof against the employer. The employee is not denied his right to proceed against the employer alone.

The only departure from these holdings is found in Justice Stewart's concurring opinion in UPS and the Fifth Cirucit's decision in Holmes.

The majority opinion in UPS was authored by Justice (now Chief Justice) Rehnquist and recognizes that an aggrieved employee may sue either his employer or union or both. 101 S.Ct. at pages 1563 and 1564. Justices Blackmun and Stewart filed concurring opinions and Justice Stevens concurred in part and dissented in part.

Justice Stewart, in his concurring opinion states:

> ". . . a plaintiff must prevail upon his unfair representation claim before he may even litigate the merits of his § 301 claim against the employer."

and:

> "When the 6-month period of § 10(b) has passed the employee should no longer be able to challenge the alleged breach of duty by his union, and as this is a pre-condition for maintaining the contract action, he should not be able to challenge the employer's action either." 101 S.Ct. at pages 1566 and 1567.

thus indicating, in his view, that an aggrieved employee must name as defendants and sue both the employer and union in order to prevail in a § 301 action.

Justice Stewart's concurring opinion is not the majority reason and opinion. He believes that the result reached by the majority is correct; however, he would reach the same result from a far more restrictive and different viewpoint.

In their concurring opinions, Justices Blackmun and Stevens specifically and severely criticize Justice Stewart's view.

Justice Stevens points out:

". . . Indeed, although the employee in this case chose to sue both the employer and the union, he was not required to do so; he was free to institute suit against either one as the sole defendant." (Emphasis added) 101 S.Ct. at page 1569, N.2

The majority opinion holds that the employee may sue either the employer or the union or both. Nowhere in the majority opinion is it held, nor has there ever been a Supreme Court decision which holds, that you must sue both the union and the employer in order to prevail. All the decisions of this Court have held, and it is the law today, that in order to prevail you must only show a subversion of the hearing process in order to reach either your claim against the union for bad representation or your claim against the employer for breach of contract or both. You may sue both, but you certainly may sue only one if you wish.

Justice Stewart would have taken that decision one step further by requiring that both the union and the employer must be sued within the time limitation (six months) of § 10(b) of the Labor-Management Relations Act in order to prevail against either.

Justice Stewart's comments in UPS have never been codified or recognized by further decisions of this Court. Simply put, the majority of this Court has never reached this position but rather has rejected it repeatedly.

Justice Blackmun, in his concurrence, points out that the resolution of this question "properly should await the development of a full adversarial record". 101 S.Ct. at p. 1565.

That development of a full adversarial record came about in Del Costello which applied the six month provision of § 10(b) to actions of this type. However, Del

Costello did not go the extra mile that Justice Stewart wanted it to go in his concurring opinion in UPS for, most importantly, the Del Costello decision, as followed by the Fifth Circuit in Daigle and Smith vs. Kerville, not only makes reference to but specifically recognizes the employee's right, if he chooses, to sue either the Union or the employer or both. 103 S.Ct. at page 2291.

Thus, Del Costello specifically retained the rationale and holdings of Vaca, Hines, Clayton, UPS and Bowen that the aggrieved employee does not have to sue both the employer and union in order to prevail but may sue either one or both at his option.

Our district courts and Circuit Courts of Appeal are bound by and must follow what the majority opinions of this Court hold.

Although not adopted by any majority in any case and contrary to its earlier holding in Smith vs. Kerville and inconsistent with its later holding in Daigle, the Fifth Circuit, in Holmes, adopts Justice Stewart's most restrictive view from his concurrence in UPS by holding:

> ". . . Holmes would be required to show that the Union breached its duty before the merits of his claim against Greyhound could be reached. Because his claims against the Union are indisputably time-barred, the district court would not be authorized to reach the merits of Holmes' claims against Greyhound." (Emphasis added) 757 F.2d at p. 1567.

the effect of which would make it mandatory for an aggrieved employee to name and sue both his employer and union in a § 301 action within six months of the arbitration decision.

Under Holmes petitioners such as Albert Morella and Lester Anthony who choose

to sue and assert claims against only their employer, as is their right under Vaca, Del Costello, Hines, Clayton, Bowen, U.P.S., (majority) Smith vs. Kerville and Daigle, would be left with no remedy at all and unfairly denied that precious access to our courts in order to be made whole and regain their livelihoods.

At page 3 of its opinion the District court, citing UPS, holds

> ". . . the employee must assert and prevail upon both the unfair representation claim and the breach of contract claim in order to be granted relief."

thus holding that an aggrieved employee in a § 301 action must sue both the employer and union together and cannot sue one without the other.

This Court has never held that in a § 301 action an aggrieved worker must assert a claim against his union by naming it as a party defendant in order to be granted relief

on his claim against his employer for breach of contract. Rather this Court continues to hold just the opposite, that the aggrieved employee may sue his employer for breach of contract without naming the Union as a defendant and need only show the union's breach of its duty to fairly represent him in the arbitration process as an element of his proof against his employer alone.

In view of the liberality of the federal notice system of pleading and the fact, as admitted in their original motion for summary judgment filed before the Complaint was amended, that the employer herein was on notice and aware that even though not named as a party defendant there would be allegations of union wrongdoing, how can Holmes effectively shut out these petitioners and their families from even their chance to regain their jobs and livelihood and square with Vaca, Hines,

Clayton, Bowen, UPS (majority), Del Costello, Kaiser, Smith vs. Kerville and Daigle?

It is respectfully submitted that it cannot and that this Court must grant this writ and reverse both the Fifth Circuit and District Court herein.

In its opinion the District Court holds that the allegtions of the amended complaint should not relate back as against the Company or Union because, in its opinion, they do not arise out of the same "conduct, transaction or occurrance" citing FRCP 15(c) and Schiavone vs. Fortune, 477 U.S. ____, 106 S.Ct. 2379 (1986).

This Court's ruling in Schiavone was based upon and limited to the peculiar facts of that case and took great pain not to overrule Conley vs. Gibson, 355 U.S. 41 (1957) or Foman vs. Davis, 371 U.S. 178 (1962) both of which held that FRCP 15 should be liberally construed favoring decisions on

the merits and rejecting the idea that pleading is a game of skill in which one misstep could be decisive and, further, that technicalities should not be used to avoid trials on the merits.

The District Court then goes on to explain in its opinion since the action against the Company is for breach of contract and the unfair representation allegations are against the Union they do not fall under FRCP 15(c).

FRCP 15(c) states, in pertinent part:

> "Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." (Emphasis added)

There is no question but that this matter revolves around one set of ongoing

operative facts and circumstances beginning with the execution of the contract and continuing with the first layoff on March 9, 1984, the first Grievance Committee hearing, the second layoff on August 2, 1985, the second Greivance Committee hearing, the last layoff on June 10, 1986 and the last Grievance Committee hearing on November 12, 1986.

The petitioners chose to name the employer only (as was their right, Del Costello) in their original complaint. By its own admission the employer was well aware and on notice that unfair union representation would be part of the proof against it alone (UPS) even if the union was never added as a defendant.

Following the District Court's reasoning leads one to the illogical and inconsistent result that the claims against the employer and union are one and the same

for purposes of the Statute of Limitations, but, on the other hand, do not arise out of the same conduct, transaction or occurrence. How can this be?

When balancing these interests, this Court, in Vaca, Clayton, Hines, Bowen, Del Costello and UPS has consistently opted for and held in favor of the employee's right to have access to the court as opposed to the employer's or the union's position to deny access.

Therefore, the amended complaint should have been allowed to relate back at least as to the claim against the employer and the case should not have been dismissed.

CONCLUSION

The decision of the District Court and its affirmation by the Fifth Circuit in this matter are in direct conflict with directly applicable decisions of this Court

(Vaca, Hines, Clayton, Bowen, UPS [majority], Del Costello, Conley and Foman), the Ninth Circuit (Kaiser) and the Fifth Circuit itself (Daigle, Smith vs. Kerville).

There is no question that petitioners have the right, at their option, to sue either the employer or the Union or both in a § 301 action such as this.

The District Court, as affirmed by the Fifth Circuit, has now dismissed the entire suit as time barred including the action against the company alone even though it was timely filed, thus denying petitioners of their claim and access to the courts.

By dismissing the case summarily prior to even discovery, much less the merits, the lower court has unfairly precluded appellants from their day in court in spite of this Court's clear holdings to the contrary.

It is submitted that the far reaching effect that this matter and Holmes, if allowed to stand, will have on chilling the rights of aggrieved workers from seeking redress in a § 301 action against their employer alone for breach of contract is a fundamental and substantial question of Federal Law.

Fundamental fairness and the maintenance of uniformity of decisions cry out to this Court that it should grant this Writ, take the matter up and settle the issues raised herein once and for all by reversing both the Fifth Circuit and District Court and remanding the case for trial on the merits.

JOEL P. LOEFFELHOLZ
Attorney for Petitioners
2-3-4 Loyola, Suite 900
New Orleans, LA 70112
Phone: (504) 524-9687

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed to all counsel of record, first class, postage prepaid, this 10th day of February, 1989.

JOEL P. LOEFFELHOLZ

APPENDIX A

29 U.S.C.A. § 185

Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity

and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons,

subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NO. 87-2093 SECTION L

ALBERT MORELLA AND LESTER ANTHONY

VERSUS

COOPER T. SMITH STEVEDORING CO., INC., ET AL

Defendant's motion to dismiss plaintiff's amended complaint and defendant's motion for summary judgment were granted by the Court on a former date for the following reasons.

The plaintiffs, Albert Morella and Lester Anthony, members in good standing of the General Truckdrivers, Chauffeurs, Warehousemen and Helpers Local 270, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman, and Helpers of America Independent (Union) were laid off allegedly for lack of work. At all relevant times a collective bargaining

agreement (CBA) existed between the Union and Cooper T. Smith Stevedoring Co., Inc. (Cooper), plaintiffs' employer. Plaintiffs Claimed that they were laid off becuase the company subcontracted out work normally performed by plaintiffs in violation of Article 27 of the CBA.[1]

Article XI §2 of the CBA provides that all unresolved grievances filed by employees against Cooper be referred to a joint employer/union committee for resolution. Finally, Article 10, §2 of the CBA provides:

> When layoffs become necessary, the youngest workman in point of service shall be laid off first, and when rehiring commences, the oldest workman in point of

---

[1]Article 27 provides:

> The Company agrees that it will not subcontract out any work normally performed by employees represented by the Teamsters Local No. 270 for the purpose of laying off any regular fulltime employee, where the necessary equipment to perform said work is available when needed and skills of present employees can be utilized when needed.

> service shall be rehired first provided that in both these instances qualifications and abilities to the job are relatively equal.

The plaintiffs filed grievances with the Union and Company with respect to the layoffs. On November 14, 1986, a majority of the committe denied the grievances. Subsequent to the Grievance Committee's ruling, plaintiffs claim they came into possession of documentary proof of the company's subcontracting out of their work. However, because the grievance procedure was completed and could not be reactivated under the terms of the contract, they brought the instant action based on the company's alleged breach of the contracting-out provision.

On July 16, 1987, plaintiffs filed an Amended Complaint in order to add a claim against the Union for breach of its duty of fair representation. The defendant claimed that the breach of duty of fair representation claim contained in plaintiffs'

amended complaint is time-barred by the six-month statute of limitations applicable to hybrid 301/fair representation suits.

It is settled that individual employees seeking to bring suit against their employer for breach of a collective bargaining agreement, must first exhaust any grievance or arbitration remedy provided in the contract. Clayton v. International Union, 451 U.S. 679, 101 S.Ct. 2088, 68 L.Ed. 538 (1981); Republic Steel Corp. vs. Maddex, 379 U.S. 650, 85 S.Ct. 614, 13 .Ed.2d 580 (1965). When an employee is attempting to vacate an arbitration award, he will be allowed to proceed only when it is demonstrated that his union's breach of its duty seriously undermined the integrity of the arbitral process. United Parcel v. Mitchell, 451 U.S. 56, 61, 101 S.Ct. 1559, 67 L.Ed. 732 (1981). The two causes of action have come to be known as "hybrid §301/duty of fair representation" actions, since the employee must assert and prevail upon both

the unfair representation claim and the breach of contract claim in order to be granted relief. Daigle v. Gulf State Utilities Co., 494 F.2d 974 (5th Cir. 1986).

There is a six month statute of limitations which applies to claims brought against both the union and the employer in hybrid § 301/duty of representation suits that begins to run the day the arbitration award is made. Del Castello v. Teamsters, 462 U.S. 151, 76 L.Ed. 2d 476, 103 S.Ct. 2281 (1983). In this case, the arbitration award was issued on November 14, 1986. On May 6, 1987, within six months of the arbitration award, plaintiffs filed their complaint against Cooper alleging that Cooper had breached the contracting-out provision of the CBA. It was not until July 16, 1987, eight months after the arbitration award was issued, that plaintiffs filed their amended complaint alleging for the first time that the Union had breached is duty of fair representation in connection with its handling of the arbitration proceeding.

Therefore, as to this case, the statute of limitations had run for amending plaintiffs complaint before it was filed.

The unfair representation claim against the Union does not arise out of the same "conduct, transaction or occurrence" alleged in the original complaint and therefore does not fall within the purview of Fed. R. Civ. P. 15(c). Fed. R. Civ. P. 15 (c) provides in pertinent part:

> Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

See also, Schiavone v. Fortune, 477 U.S. __ , 91 L.Ed. 2d 18, 106 S.Ct. 2379 (1986). Here, plaintiffs' breach of contract claim relates to the June 10, 1986 layoff of plaintiffs by Cooper, which occurred shortly after their reinstatement from a prior layoff pursuant to a Settlement Agreement. This second layoff, plaintiffs claim, resulted from Cooper

contracting-out of work in violation of the CBA agreement. On the other hand, plaintiff's unfair representation claim relates to alleged acts and omissions by the Union at the Joint Grievance Committee hearing on November 12, 1986. Thus, the two claims involve different theories and different conduct of different parties occurring at different times and places. Therefore, plaintiff's unfair representation claim does not fall within the purview of Fed. R. Civ. P 15(c) and thus, does not relate back to the original complaint.

Furthermore, the only way a plaintiff who has received a binding decision through a grievance procedure mandated under a contract can litigate the merits of his grievance, is to show that the grievance process has been subverted in some manner by the Union and that the Union has breached its duty of fair representation. Haynes v. United States Pipe and Foundry Co., 362 F.2d 414 (5th Cir. 1966). Since the breach of duty of fair representation claim contained

in plaintiffs' amended complaint is time-barred by the six-month statute of limitations applicable to hybrid section 301/fair representation suits, there is not any material issue in dispute and therfore, summary judgment is warranted.

New Orleans, Louisiana this 19th day of November, 1987.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NO. 87-2093 SECTION "L"

ALBERT MORELLA AND LESTER ANTHONY

VERSUS

COOPER/T. SMITH, INC., ET AL

J U D G M E N T

The Court having granted defendants motion to dismiss, accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Cooper T. Smith, Inc. and General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 and against plaintiffs, Albert Morella and Lester Anthony dismissing plaintiffs' suit at their costs.

New Orleans, Lousiana, this 20th day of November, 1987.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

APPENDIX D

SEE: Holmes v. Greyhound Lines, Inc., 757 F.2d 1563 (5th Cir. 1985)

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3815

ALBERT MORELLA and LESTER ANTHONY,

Plaintiffs-Appellants,

versus

COOPER/T. SMITH, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Lousiana
(CA-87-2093-L(2))

(October 19, 1988)

Before POLITZ, GARWOOD, and SMITH, Circuit Judges.

PER CURIAM:*

The judgment below is affirmed. This result is mandated by our opinion in Holmes v. Greyhound Lines, Inc., 757 F.2d 1563 (5th Cir. 1985)

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 87-3815

ALBERT MORELLA and LESTER ANTHONY,

Plaintiffs-Appellants,

versus

COOPER/T. SMITH, ET AL.,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Lousiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion October 19, 5 Cir. 1988, __ F.2d__)

(November 17, 1988)

Before POLITZ, GARWOOD and SMITH, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court

having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Bank is DENIED.

ENTERED FOR THE COURT:

WILL GARWOOD
UNITED STATES CIRCUIT JUDGE REHG-8